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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

DAVID GILBERT SAFFRON
a/k/a DAVID GILBERT and
CIRCLE SOCIETY, CORP.,

Defendants.

Case No. 2:19-cv-1697-JAD-DJA

**PLAINTIFF CFTC'S MOTION FOR
LEAVE TO ENGAGE IN LIMITED
THIRD-PARTY DISCOVERY PRIOR TO
RULE 26(f) CONFERENCE**

Plaintiff Commodity Futures Trading Commission ("CFTC" or "Plaintiff") respectfully moves the Court to issue an order granting the CFTC leave to issue third-party subpoenas upon the financial institutions and digital currency exchanges described herein and identified in Exhibit 1 (attached), prior to the conference required by Fed. R. Civ. P. 26(f), and in support thereof, states as follows.

I. BACKGROUND

The CFTC filed the instant lawsuit against David Gilbert Saffron ("Saffron") and Circle Society, Corp. ("Circle Society") (collectively, the "Defendants") on September 30, 2019. Complaint, ECF No. 1. Defendants were duly served with the Complaint, Summonses, and other filings but have failed to plead within the time prescribed by the Federal Rules of Civil Procedure. *See* Aff. of Service on Def. Circle Society, ECF No. 14; Mot. for Entry of Clerk's

1 Default Against Def. Circle Society, ECF Nos. 20, 20-1; Proof of Service by Publication on Def.
2 Saffron, ECF No. 27; Mot. for Entry of Clerk's Default Against Def. Saffron, ECF Nos. 41, 41-
3 1. The CFTC's service of process on Saffron was complete on November 29, 2019 (*see* ECF
4 No. 27), and Saffron's 21-day period to answer or move against the Complaint expired on
5 December 20, 2019. *See* Fed. R. Civ. P. 12(a)(1)(A)(i).

6 After Saffron failed to answer the Complaint and failed to otherwise appear and abide by
7 this Court's Temporary Restraining Order ("TRO") dated October 3, 2019 (ECF No. 9) and
8 Preliminary Injunction Order ("PI Order") dated December 6, 2019 (ECF No. 31), the CFTC
9 filed a Motion for Entry of Clerk's Default Against Saffron on December 21, 2019 (ECF Nos.
10 41, 41-1). The Clerk of this Court entered default against Saffron on December 23, 2019.
11 Clerk's Entry of Default, ECF No. 42. Following the Clerk's Entry of Default Against Saffron,
12 Saffron filed an untimely Answer on December 23, 2019. Answer, ECF No. 43. The CFTC
13 subsequently moved to strike Saffron's untimely Answer. Mot. to Strike, ECF No. 45. On
14 January 30, 2020, this Court granted the Motion to Strike and ordered Saffron's untimely
15 Answer stricken. Order Striking Saffron's Answer, ECF No. 52.

16 During the pendency of this litigation, the Court has issued multiple orders directing
17 Defendants to, among other things, produce all of its business records to the CFTC and provide
18 the CFTC with an accounting of the disposition of all pool participant assets and Defendants'
19 assets. TRO, ECF No. 9; PI Order, ECF No. 31. The TRO and PI Order also freeze Defendants'
20 assets and prohibit Defendants from further violating the Commodity Exchange Act or the CFTC
21 Regulations. Defendants have repeatedly refused to abide by these orders.

22 As a result of Defendants' knowing and intentional refusal to obey this Court's orders,
23 the CFTC has filed multiple motions for Defendants to show cause why they should not be held
24

1 in contempt.¹ There have been three Court hearings in connection with Defendants' contempt.
2 On December 2, 2019, the Court held a motion hearing, converted the TRO to a PI Order, and
3 heard representations regarding Plaintiff's Show Cause Motion as to Circle Society ("Show
4 Cause Mot. I," ECF No. 24), and continued the show-cause hearing. *See* Minutes of
5 Proceedings, ECF No. 30. Saffron, the sole corporate officer of Circle Society, did not appear at
6 the December 2, 2019 hearing. On January 10, 2020, the Court held a show-cause hearing, heard
7 representations regarding Plaintiff's Show Cause Motion as to Defendants ("Show Cause Mot.
8 II," ECF No. 40), and issued an Order granting Plaintiff's Show Cause Motion II. *See* Minutes
9 of Proceedings, ECF No. 47; Order, ECF No. 48 (ordering Defendants to appear and show cause
10 on January 24, 2020). At the third hearing on January 24, 2020, Saffron finally appeared and
11 "offered excuses and promises, [but] he failed to show cause why he and Circle Society should
12 not be held in civil contempt for violating the injunction order." Contempt Order, ECF No. 51 at
13 p. 1. At this third hearing, the CFTC requested compensatory damages incurred in the
14 investigation and prosecution of Defendants' contempt. The Court stated that it would entertain
15 a motion by the CFTC for such damages, which the CFTC filed on January 31, 2020. Pl.'s Mot.
16 for Fees and Expenses, ECF No. 56. On June 5, 2020, the Court granted the CFTC's Motion for
17 Fees and Expenses, ordering Defendants to pay Plaintiff \$14,279.30. Order Granting Mot. for
18 Compensatory Fees and Expenses, ECF No. 76.

21 Despite being found in contempt, and once again ordered to comply with the terms of the
22 PI Order, Defendants continue to violate the court orders to produce an accounting and business
23

25 ¹ There are two remaining CFTC motions pending before the Court: (1) Motion for Default
26 Judgment filed March 9, 2020 (ECF No. 61); and (2) Motion for Additional Sanctions filed
27 March 12, 2020 (ECF No. 62). Defendants have not responded to the Motion for Default
28 Judgment, and the Motion for Additional Sanctions has been fully briefed.

records, comply with the asset freeze, and/or cease violating the anti-fraud provisions of the Commodity Exchange Act.² TRO, ECF No. 9; PI Order, ECF No. 31; Civil Contempt Order, ECF No. 51. The CFTC has reason to believe that certain persons and entities are acting as “strawmen” to hold and move Defendants’ assets, and that there are financial institutions and digital currency exchanges with accounts holding Defendants’ assets and/or on which Saffron is a signatory. As a result of Defendants’ failures to comply with the Court’s multiple orders, and the inability of the CFTC to obtain Defendants’ records and financial information without utilizing the discovery process, the CFTC now seeks leave to issue third-party subpoenas prior to the Rule 26(f) conference. These subpoenas will enable the CFTC to obtain at least some of Defendants’ financial records, examine the scope of Defendants’ fraud, and determine if Defendants have violated the asset freeze order in the matter.

The CFTC seeks leave of court to issue subpoenas to the following financial institutions and digital currency exchanges:

American Express Company; Bank of America; BitPay, Inc.; Coinbase, Inc.; Comanche National Bank; Comerica Bank; FirstView, LLC; Gemini Trust Company, LLC; JPMorgan Chase Bank; NBH Bank; PNC Bank; Uphold HQ, Inc.; Wells Fargo Bank; and, Zions Bancorporation, N.A. d/b/a Nevada State Bank.

Attached and incorporated as Exhibit 1 is a detailed listing of the specific accounts and their relevance to this matter.

II. ARGUMENT

A. This Court Has Authority to Permit the Limited, Early Discovery Requested by Plaintiff

Federal Rule of Civil Procedure 26(d)(1) provides that a party may not seek discovery

² As of the date of this filing, Defendants owe this Court \$486,000 in daily fines pursuant to the Civil Contempt Order, ECF No. 51. Defendants have refused to pay these fines to date.

from any source before the parties have conferred as required by Fed. R. Civ. P. 26(f), except by specific court order. District courts are vested with broad discretion to permit and control discovery. *See Sablan v. Dep't of Fin.*, 856 F.2d 1317, 1321 (9th Cir. 1988); *Unity Courier Serv. Inc. v. Hudson Ins. Co.*, No. 2:18-cv-8143, 2019 WL 6974309, at *3 (C.D. Cal. Nov. 6, 2019) (citing *Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir.1993)). It is well settled that in situations such as this, courts may order expedited discovery before the Rule 26(f) conference upon a showing of good cause. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011); *Semitool, Inc. v. Tokyo Electron Am. Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613-14 (D. Ariz. 2001). “Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009) (quoting *Semitool, Inc.*, 208 F.R.D. at 276). Under this standard, a court must examine the discovery request on the entirety of the record to date and the reasonableness of the request in light of all surrounding circumstances. *Am. LegalNet, Inc.*, 673 F. Supp. 2d at 1066.

B. Good Cause Exists for Permitting Plaintiff to Engage in Limited, Third-Party Discovery, and Defendants Will Not Be Prejudiced by the Relief Requested

Here, ample good cause and compelling reasons exist for this Court to permit expedited, third-party discovery. As detailed in previous CFTC motions and found by the Court, Defendants have refused to obey this Court’s lawful orders and engaged in a knowing and intentional course of conduct to conceal from the CFTC and the victims of their fraudulent scheme the location and amount of Defendants’ assets.³ Defendants have also gone to

³ *See, e.g.,* Pl.’s Show Cause Motion II (ECF No. 40); Pl.’s Notice of Defs.’ Non-Compliance (ECF No. 58); Pl.’s Mot. for Additional Sanctions (ECF No. 62); Pl.’s Opp. to

1 significant lengths to conceal financial information from both the CFTC and the Court that
2 would reveal whether Defendants have been knowingly and intentionally violating the asset
3 freeze provisions of the TRO and PI Order. By refusing to comply with this Court's multiple
4 orders and preventing the CFTC from determining the disposition of Defendants' assets,
5 Defendants have engaged in an intentional course of conduct to impair the CFTC's ability to
6 ascertain the entire scope of Defendants' fraudulent scheme and deny defrauded pool participants
7 restitution. Given Defendants' contumacious and unlawful conduct, the CFTC has no other
8 reasonable avenue to obtain this information other than by issuing subpoenas and engaging in
9 other limited discovery prior to the Rule 26(f) conference.

11 Expedited discovery is necessary to enable the CFTC to fulfill its statutory duties and
12 would contribute to the orderly and expeditious administration of the case. Specifically,
13 discovery of Defendants' complete assets (including the location and disposition of assets), the
14 identification of funds from accounts that may be subject to the asset freeze, and identification of
15 Defendants' pool participants will enable the CFTC to protect Defendants' pool participants
16 from further loss and damage. Courts have granted plaintiff's requests for expedited discovery
17 in similar cases. *See, e.g., AT&T Mobility LLC v. Dynamic Cellular Corp.*, No. 1:08-cv-20537,
18 2008 WL 2139518, at *2-3 (S.D. Fla. May 7, 2008) (finding good cause to expedite discovery
19 and to enter an order preserving evidence); *CFTC v. Heierle*, No. 1:07-cv-22396, 2007 WL
20 4351424, at *1 (S.D. Fla. Sept. 18, 2007) (finding good cause to expedite discovery "in order to
21 ascertain the existence and location of assets and identify all pool participants and other
22 investors"); *Pod-Ners, LLC v. Northern Feed and Bean of Lucerne Ltd. Liability Co.*, 204 F.R.D.

26 Defs.' Mot. to Set Aside Entries of Default (ECF No. 69); Civil Contempt Order (ECF No.
27 51); Order Denying Mot. to Set Aside Default (ECF No. 77).

1 675, 676 (D. Colo. 2002) (finding good cause to expedite discovery where physical evidence
2 may be consumed or destroyed with the passage of time, thereby disadvantaging one or more
3 parties to the litigation). Under these circumstances, the Court would be well within its
4 discretion to grant the reasonable relief sought.

5 This Motion is brought in a good faith effort to expedite discovery and obtain the
6 information that the Court has already ordered to be produced in prior orders. The CFTC would
7 be entitled to issue such subpoenas once the Rule 26(f) conference is held, or once the Court
8 issues its own scheduling order. The CFTC merely seeks leave of court to issue the same
9 subpoenas now to preserve evidence of an ongoing fraud, identify funds from financial accounts
10 that may be subject to the asset freeze, and determine if the Court's prior orders have been
11 violated. The third parties are still entitled to object as appropriate. Defendants will not be
12 prejudiced in any manner because the information sought should have already been produced by
13 Defendants without the need for the CFTC to incur the time and cost of third-party discovery.
14

15 **CONCLUSION**

16
17 For the reasons stated above, the CFTC respectfully requests leave of the Court to begin
18 limited third-party discovery by issuing subpoenas to the financial institutions and digital
19 currency exchanges described herein and identified in Exhibit 1 and the proposed order. In the
20 event the Court deems it appropriate to hold a hearing on the relief requested herein, the CFTC is
21 available to participate in person or telephonically at the Court's earliest convenience.

22 Dated: October 7, 2020

Respectfully submitted,

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24 By: /s/ Danielle E. Karst
Danielle E. Karst
Timothy J. Mulreany
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26 **COMMISSION**
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CERTIFICATE OF SERVICE

On October 7, 2020, I served a copy of *Plaintiff CFTC's Motion for Leave to Engage in Limited Third-Party Discovery Prior to Rule 26(f) Conference*, on counsel of record below by filing a copy of the same with the Clerk of the Court using the CM/ECF system.

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/s/ Danielle E. Karst

Danielle E. Karst